HAYATI AIZAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 41-271-98]
5 NOVEMBER 1999

CRIMINAL PROCEDURE: *Appeal - Absent appellant - Dismissal of appeal - Section 313(ii) Criminal Procedure Code - Scope and effect - Whether authorising court to dismiss appeal when appellant is absent - Whether appeal to be dismissed*

The appellant was convicted of an offence under s. 45A(1) of the Road Transport Act, 1987 and was sentenced to three days' imprisonment and a fine of RM1,000 in default 20 days' imprisonment. The appellant appealed against the sentence and was admitted to bail pending hearing of the appeal. The appellant, however, had failed to present herself before the appellate court for the hearing of the appeal, and on five occasions the appellate court had to postpone the hearing as the notice of hearing of the appeal could not be served on the appellant. The appellant's counsel was present on all occasions but could not enlighten the court as to the appellant's whereabout. The learned Deputy Prosecutor in the circumstances asked the appellate court to exercise its discretion under s. 313(ii) CPC and dismiss the appeal.

Held:

[1] Section 313(ii) CPC has two parts, ie. the enacting part and the proviso. The enacting part provides a general rule that the court may entertain an appeal when the appellant is not present. This part, however, is circumscribed by the proviso. In the circumstances enumerated in the proviso, the court may refuse to consider the appeal except on such terms as it thinks fit to impose.

[2] The use of the word "except" in the proviso means that the imposition of the terms referred to therein is discretionary. Thus, the court may consider the appeal as provided in the proviso only if it fixes any terms as it thinks fit to impose. If the court does not fix any terms, as for example by not granting an adjournment, then it cannot consider the appeal with the result that the appeal must be dismissed.

[3] The appellant had failed to appear personally in court on five occasions in pursuance of a condition upon which she was admitted to bail. That being so, it is an abuse of the process of the court to adjourn the hearing of the appeal any further. The discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal.

[Appeal dismissed.]

Case(s) referred to:
Lakshmandas v. The State AIR [1968] Bom 400 ***(refd)***
Leong Yew Thong v. PP [1996] 2 SLR 348 ***(not foll)***
Rahim Usoff & Ors v. PP [1984] 2 CLJ 121 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 313(ii)
Road Transport Act 1987, s. 45A(1)

Other source(s) referred to:
Black's Law Dictionary, 6th edn

For the appellant - Suresh Thanabalasingam; M/s Kuldip & Assoc
For the PP - Noor Ruwena Mohd Nordin DPP

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

Hayati binti Aizan (the accused in the court below and the appellant before me) was charged in the Magistrate's Court at Kuala Lumpur on 31 July 1998 for an offence under s. 45A(1) of the Road Transport Act 1987. She pleaded guilty to the charge and the learned magistrate imposed a sentence of three days' imprisonment and a fine of RM1,000 in default twenty days' imprisonment. On an application made by her the sentence imposed was stayed pending appeal. She was then admitted to bail upon her executing a bond undertaking to appear before the High Court when called upon to do so; and to forfeit a sum of RM2,000 if she failed to do so. She filed her notice of appeal on 8 August 1998.

The appeal was called up for hearing before me on five occasions, that is to say, on 20 May 1999, 30 June 1999, 12 August 1999, 16 September 1999 and 28 October 1999. The hearing could not proceed on each of these occasions as the notice of hearing of the appeal could not be served on her. Her counsel, who was present on all occasions, also said that he could not trace her. Thus when the appeal was called up for hearing on 28 October 1999 the learned Deputy Public Prosecutor applied for the appeal to be dismissed

and, in support, referred to *Rahim bin Usoff & Ors v. PP* [1985] 1 MLJ 241 where Shankar J (as he then was) in dismissing an appeal when the appellant was not present said at p. 242:

> In these circumstances I have exercised my powers under section 313(ii) of the Criminal Procedure Code and have accordingly directed that this court will in all the circumstances refuse to consider this appeal further and hereby makes an order that the appeal of the third Appellant Juraimi bin Suib is hereby dismissed.

In his reply learned counsel for the appellant said that he leaves the matter to the court to decide.

The manner of dealing with an appeal when the appellant is not present is governed by s. 313(ii) of the Criminal Procedure Code ("the section') which reads as follows:

> If the appellant does not appear to support his appeal the court may consider his appeal and may make such order thereon as it thinks fit: provided that the court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.

The critical issue for determination is whether the section authorises the court to dismiss an appeal when the appellant does not personally appear before the court. Yong Pung How CJ suggested that the section does not give an express power of dismissal when the appellant is absent in *Leong Yew Thong v. PP* [1996] 2 SLR 348, where his Lordship, after referring to the section, said at p. 351:

> As is apparent from the above, there is a difference between the local position and that in Malaysia. There, when an appellant is absent, the court may make an order which it thinks appropriate, or it may refuse to consider the appeal, or make such an order only on condition. There is no express power of dismissal, and indeed it could be interpreted that that provision does not in fact empower the court to dismiss the appeal, but only not to consider it, leaving it to be heard at some date in the future. However, this was not the approach adopted in *Rahim bin Usoff & Ors v. PP* [1985] 1 MLJ 241, where Shankar J applied s. 313(ii) of Enactment 6 of 1935 in respect of an absent appellant, and ordered the appeal to be dismissed.

I shall now consider whether the section authorises the court to dismiss an appeal when the appellant is absent. A close reading of the section will show that it is in two parts. The enacting part provides that if the appellant does not appear to support his appeal the court may consider his appeal and may make such order thereon as it thinks fit. Thus, the general rule as provided by the section is that the court may entertain an appeal when the appellant is

not present. However, this part, though widely worded, is circumscribed by the proviso to the section. The proviso states that in the case of an appellant who is out of the jurisdiction or who does not appear personally before the court in pursuance of a condition upon which he was admitted to bail the court may refuse to consider the appeal or to make any such order except on such terms as it thinks fit to impose. What it means is that, in the circumstances enumerated in the proviso, the court may refuse to consider the appeal except on such terms as it thinks fit to impose. The word "except" is defined in *Black's Law Dictionary* 6th edn as:

> But for; only for; not including; other than; otherwise than; to leave out of account or consideration.

The use of the word "except" in the proviso therefore means that the imposition of terms referred to therein is discretionary. Thus the court may consider the appeal as provided by the proviso only if it fixes any terms as it thinks fit to impose as, for example, by requiring the attendance of the appellant at an adjourned date. If the court does not fix any terms, as for example, by not granting an adjournment then it cannot consider the appeal with the result that the appeal must be dismissed. The rationale for the dismissal of an appeal in the circumstances enumerated in the section can be gathered from *Lakshmandas v. The State* AIR [1968] Bom 400 where Patel J said at p. 426:

> It is against all reasons that this court should be compelled to hear the appeal on merits even though the accused has, after obtaining bail, removed himself out of the jurisdiction of this court. If that were so, he would take a chance of success in the appeal and return to the country triumphant if his appeal is allowed, but if his appeal is dismissed, he would say he cares little for the orders of the court. Unless, therefore, there is any obligation on the court to hear the appeal, the court would be justified in dismissing it only on this ground.

Accordingly, I am unable to agree, and with the utmost respect, with the view expressed in *Leong Yew Thong v. PP, supra*, and would readily agree with the stand taken by Shankar J (as he then was) in *Rahim bin Usoff & Ors v. PP, supra*.

In the appeal before me the appellant had failed to appear personally in court on five occasions in pursuance of a condition upon which she was admitted to bail. It would be an abuse of the process of the court to adjourn the hearing of the appeal any further. I was therefore of the view that the discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal. Thus I dismissed the appeal.